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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 673

MARGARET NUGENT,

Petitioner,

vs.

YELLOW CAB COMPANY,

Respondent.

PETITIONER'S REPLY.

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I.

The cases relied upon by defendant are not in point.

There are two crucial differences between the case at bar and almost every case cited and relied upon by defendant at pages 4 to 6 and 10 to 12 of its brief:

First. In none of those cases except *Hulson* was an order entered by the trial judge extending the time within which a motion for new trial could be filed; and

Second. In all but three of those cases, no request was made for relief under Rule 60(b) when the trial judge and counsel learned that Rule 6(b) prohibits extensions of time for filing motions for new trial.

By misstating plaintiff's position, defendant has erected and demolished a straw man. Plaintiff does *not* contend that the trial court has authority to extend the time for filing a motion for new trial; that issue has been settled by the cases defendant cites at page 6 of its brief. Nor does plaintiff argue that counsel, by stipulation, may confer jurisdiction on the trial court to enlarge the time. Cases such as those cited by defendant at pages 10 to 12 correctly hold to the contrary.

What plaintiff *does* contend is that under the circumstances of this case, the trial judge had power to grant plaintiff's petition for relief under Rule 60(b), and the Court of Appeals erred in holding that such power did not exist.

This case is important in the over-all context of the administration of justice in federal courts because the Court of Appeals for the Seventh Circuit has placed so grudging and narrow a construction on Rule 60(b) as to render it a dead letter. This is especially egregious in light of the fact that Rule 60(b) was adopted in order to afford courts a means to their noblest end—the accomplishment of justice between the parties. This case is also important because the construction placed on Rule 60(b) by the Seventh Circuit Court of Appeals is in conflict with the ruling of the Second Circuit in the *Sternstein* case, which we discuss below at pages 4 to 5.

Only three of the cases cited by defendant involved Rule 60(b). The first is the *Hulson* case, which preceded this case in the Seventh Circuit Court of Appeals, and which is discussed in our opening brief at pages 10, 14 and 15.

In *John E. Smith's Sons Co.* v. *Lattimer Foundry & Machine Co.*, 19 F.R.D. 379 (M.D. Pa. 1956) (Br. pp. 8, 10), the defendant filed but did not serve its motion for

new trial within 10 days after entry of judgment. No order was entered extending the time for service of the motion. When plaintiff moved to strike the motion, defendant's counsel orally requested relief under Rule 60(b), but did not state any facts to explain the delay. The trial court held that the motion under Rule 60(b) was inadequate (19 F.R.D. at 383-384), but that, in any event, the motion for new trial was without merit. (19 F.R.D. at 384-391.)

In *Brest* v. *Philadelphia Transportation Co.*, 24 F.R.D. 47 (E.D. Pa. 1959), opinion on appeal 273 F. 2d 22 (3rd Cir. 1959) (Br. p. 6), plaintiffs served and filed motions for new trial within 10 days after judgment, and several weeks later served and filed additional grounds for the motion. No order had been entered extending the time for filing additional grounds. When defendant questioned the timeliness of the additional grounds, plaintiffs requested relief under Rule 60(b). The District Judge said, ". . . under appropriate circumstances this Court may entertain under Rule 60(b) a motion for new trial which is untimely under Rule 59(b) . . ." But the court held no showing for relief was made because the additional grounds for new trial were without merit; the motions for new trial were denied.

The *Smith* and *Brest* cases do not announce a broad rule against relief under Rule 60(b), as claimed by defendant. To the extent they are relevant, they support plaintiff's position, because they recognize (contrary to the holding of the court below) that, under appropriate circumstances, relief may be granted under Rule 60(b) to one who has filed a motion for new trial out-of-time. But factually these cases are not helpful as precedents here.

The case at bar involves an unintentional, inadvertent, harmless, and we think understandable, oversight of the prohibition tucked away in Rule 6(b). Plaintiff's counsel, defendant's counsel, and the trial judge, all were unaware that the time for filing a motion for new trial may not be enlarged. It is precisely in situations such as this that remedial Rule 60(b) applies, and it is important, we submit, that this Court so announce.

II.

The decision below and the Sternstein case are in direct conflict.

Defendant seeks to reconcile the *Sternstein* decision by making the extraordinary assertion that "Rule 52(b) requires that a motion to amend findings must be made ten days after the entry of the judgment *or the making of additional findings.*" (Br. p. 12; italics defendant's.)

Here is what Rule 52(b) says:

> "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. . . ."

It is clear that defendant is wrong—Rule 52(b) permits motions to amend only within 10 days from entry of judgment, just as Rule 59(b) permits motions for new trial only within 10 days from entry of judgment. There is no provision in Rule 52(b) for motions to amend within 10 days after the court makes "additional findings."

In *Sternstein*, the plaintiff's motion for new trial was filed after the 10-day period. Thus, the District Judge said (23 F.R.D. at 306):

> "If judgment had been entered on December 29, 1958 the motion for a new trial would have been timely. If the entry of judgment was on December 22,

1958, the motion was not timely. Under all the facts in the case and the entries in the civil docket, the Court reluctantly comes to the conclusion that the date of entry of judgment was December 22, 1958. While the Court, as heretofore stated, was ready to grant a new trial, its jurisdiction to do so was limited by the delay of counsel for the plaintiff in making application for a new trial. The application was made too late for the Court to have authority to grant a new trial."

This is the order which the Second Circuit Court of Appeals reversed on the ground that Rule 60(b) "was not intended to deprive a trial judge of his discretionary power to direct a new trial whenever he considered such a course necessary to defeat injustice." (275 F. 2d at 503.) This broad and salutary application of Rule 60(b) is consistent with its framers intent, but is completely at odds with the holding of the Seventh Circuit Court of Appeals in this case and in the *Hulson* case.

There is a direct conflict between the Second and Seventh Circuits on this subject. And the Ninth Circuit decided *Daulton* v. *So. Pacific Co.*, 228 F. 2d 103 (9th Cir. 1955), cert. denied 352 U.S. 1005, in which a motion for new trial was served and filed more than 10 days after entry of judgment, without an extension of time, and the trial court and Court of Appeals held that relief should be granted under Rule 60(b).

This Court should grant certiorari to reconcile these conflicting decisions on the construction and application of Rule 60(b).

III.

Rule 60(b) is not limited to motions for new trial on the ground of newly discovered evidence.

At page 7 of its brief, defendant introduces a brand new interpretation of Rule 60(b) never before raised in this case (or any other case of which we are aware). The argu-

ment is that since subsection (a) of Rule 60(b) expressly refers to newly discovered evidence and motions for new trial under Rule 59(b), the drafters intended inferentially to exclude all of the other grounds for relief found in the other subsections of Rule 60(b).

We know of no case which adopts the construction defendant urges. Many cases have held to the contrary, some of which are cited in defendant's brief on other points.

This Court's opinion in *Klapprott* v. *U.S.*, 335 U.S. 601 (1949) is also to the contrary; there it was said that Rule 60(b) empowers courts "to vacate judgments whenever such action is appropriate to accomplish justice." (335 U.S. at 614-615.)

Respectfully submitted,

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